MICHAEL JAMES STINGEL

v.

THE QUEEN

HIGH COURT, AUSTRALIA
MASON CJ
BRENNAN J
DEANE J
DAWSON J
TOOHEY J
GAUDRON J
MC HUGH J
[F.C. 90/056]
20 DECEMBER 1990

CRIMINAL PROCEDURE: *Defence of provocation - Whether applicable - Whether the learned trial Judge of the Court of Criminal Appeal was correct in ruling that the matters relied upon by the appellant as giving rise to a defence of provocation - Whether objective test - Any hypothetical nineteen year old - Section 160 of the Criminal Code.*

This is an appeal pursuant to special leave, from a decision of the Court of Criminal Appeal dismissing an appeal from the appellant's conviction of murder.

It is common ground that, in the early hours of the morning of 5 June 1988, the appellant, then aged nineteen, killed a young man named J.S. Taylor by stabbing him in the chest with a butcher's knife. At the time he was killed, Taylor was sitting with his seventeen year old girlfriend (A) in a car parked in the Recreation Ground at Scottsdale, a town near Launceston. The general nature of the relationship between the appellant and A was not really in dispute. That relationship provides the context in which the events of the night of 4 June must be viewed for the purpose of determining whether a defence of provocation should have been left to the jury.

The issue that is involved in the appeal is whether a defence of provocation should have been left to the jury, falls to be resolved by reference to the version of events most favourable to the accused and that version of events, which in important respects is in sharp conflict with the sworn testimony of A was contained in the appellant's unsworn statement.

Held:

[1] The critical question is whether the jury might, if it accepted that view of the gravity and implications of the provocative conduct, have entertained a reasonable doubt whether the objective test was not satisfied. In our view, no jury could have entertained such a reasonable doubt.

[2] No jury acting reasonably, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including the insulting remark and the sexual activities in which he and A were allegedly engaging, was not of such a nature as to be sufficient to deprive any hypothetical ordinary nineteen year old of the power of self-control to the extent that he would go to his own car, obtain a butcher's knife and fatally stab the deceased with it.

[3] Put differently, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary nineteen year old. It follows that the learned trial Judge was correct in declining to leave a defence of provocation under s. 160 to the jury.

[The appeal should be dismissed.]

Cases referred to:
Lee Chun Chuen v. The Queen [1963] AC 220 ***(cit)***
Parker v. The Queen [1963] 111 CLR 610 ***(foll)***
Bedelph v. The Queen [1980] Tas R 23 ***(cit)***
Hutton v. The Queen [1986] Tas R 24 ***(cit)***
R v. Palmer [1913] 2 KB 29 ***(cit)***
R v. Withers [1925] 25 SR (NSW) ***(cons)***
Reg. v. Camplin [1978] AC 705 ***(cons)***
Moffa v. The Queen [1977] 138 CLR 601 ***(cit)***
R v. Scott [1909] 11 WAR 52 ***(dist)***
Reg. v. Stevens [1989] 2 Qd R 386 ***(dist)***
Reg. v. Hill [1986] 1 SCR 313 ***(foll)***
Johnson v. The Queen [1976] 136 CLR 619 ***(foll)***
Holmes v. DPP [1946] AC 588 ***(cit)***
Screckovic v. The Queen [1973] WAR 85 ***(cit)***
Reg. v. Webb [1977] 16 SASR 309 ***(cit)***
Reg. v. Enright [1961] VR 663 ***(cit)***
Reg. v. Fricker [1986] 42 SASR 436 ***(cit)***
DPP v. Newbury [1977] AC 500 ***(foll)***
McHale v. Watson [1966] 115 CLR 199 ***(foll)***
Reg. v. Romano [1984] 36 SASR 283 ***(foll)***
Reg. v. Conway [1985] 17 CCC (3d) 481 ***(cit)***
Jeffrey v. The Queen [1982] Tas R 199 ***(cit)***
Woolmington v. DPP [1935] AC 462 ***(foll)***
Packet v. The King [1937] 58 CLR 190 ***(cit)***
Thorpe v. R [1925] 18 Cr App R 189 ***(cit)***

Legislation referred to:
Age of Majority Act 1973 [Tas] [Aust], s. 3
Crimes Act 1900 [NSW] [Aust], s. 23
Criminal Code [Tas] [Aust], ss. 18, 122, 160, 160(1),(2),(3)
Criminal Code 1892 [Aust], c. 29 s. 229

For the appellant - M/s. Zeeman Kable & Page
For the respondent - DPP (Tas)

JUDGMENT

Mason CJ:

This is an appeal, pursuant to special leave, from a decision of the Court of Criminal Appeal of Tasmania (Nettlefold, Underwood and Wright JJ) dismissing an appeal from the appellant's conviction of murder. The issue which the appeal raises is whether, as the Court of Criminal Appeal held, the learned trial Judge was correct in ruling that the matters relied upon by the appellant as giving rise to a defence of provocation under s. 160 of the Criminal Code (Tas.) (the Code) were not capable of constituting provocation under that section with the result that that defence to the charge of murder was not left to the jury. The questions of law raised by that issue are important and of some difficulty.

It is common ground that, in the early hours of the morning of 5 June 1988, the appellant, then aged nineteen, killed a young man named Jason Scott Taylor by stabbing him in the chest with a butcher's knife. At the time he was killed, Taylor was sitting with his seventeen year old girlfriend (A) in a car parked in the recreation ground at Scottsdale, a town near Launceston. The general nature of the relationship between the appellant and A was not

really in dispute. That relationship provides the context in which the events of the night of 4 June must be viewed for the purpose of determining whether a defence of provocation should have been left to the jury.

From May until about November 1986, A and the appellant went out together on a regular basis. At that time A was a pupil at the Scottsdale High School. The relationship between them broke up, after a series of arguments, about the time when A left school. It resumed for a few days around Christmas and was then permanently terminated by A. Notwithstanding A's communicated desire not to associate with the appellant, he was and remained, to use the learned trial Judge' words, "obsessed by or infatuated with" her and would not leave her alone. He frequently waited for her outside her place of employment. He followed her about and tried to talk to her. On a number of occasions when A told him she did not want to see him or talk to him, he threatened her with violence. He even threatened to kill her so that no one else could "have" her.

In October or November 1987, A obtained a Court order restraining the appellant from approaching her or talking to her. At that time A was keeping company with another young man, Walter Baxter, who gave evidence that the appellant frequently followed the two of them. On one occasion, according to Baxter, he had been in the appellant's car when the appellant pulled up, produced a rifle, fired a shot in the air and told Baxter that that was what he proposed to do with anyone who ended up with A.

On Christmas Eve 1987, the appellant approached A while she was with her father and Baxter. There was an exchange of words between A's father and the appellant and the appellant struck the father's car as he drove off. On another occasion around Christmas 1987, the appellant approached A and informed her that Baxter would "get it" if he came to see her. Subsequently, the appellant was convicted of breach of the restraining order.

The relationship between Baxter and A came to an end in January 1988. About that time, A developed what the appellant described as "a loose relationship" with Jason Taylor. By 4 June 1988, the appellant (according to his unsworn statement at the trial) believed that Taylor was using A: "Pick her up, usually at the football club cabaret, have sex with her, and have nothing more to do with her".

There was considerable dispute at the trial about events on the night of 4 June leading up to the killing of Jason Taylor and about the precise circumstances of the killing. It is common ground that the issue involved in the appeal, namely, whether a defence of provocation should have been left to the jury, falls to be resolved by reference to the version of events most favourable to the accused (see, for example, *Lee Chun-Chuen v. The Queen* [1963] AC 220, at p. 230; *Parker v. The Queen* [1963] 111 CLR 610, at p. 616; *Bedelph v. The Queen* [1980] Tas R 23, at pp. 30, 42; *Hutton v. The Queen* [1986] Tas R 24, at pp. 29-30). That version of events, which in important respects, is in sharp conflict with the sworn testimony of A, was contained in the appellant's unsworn statement. It is as follows.

On the evening of the killing there was a cabaret at the premises of the Scottsdale Football Club. The appellant, A and Taylor were all there. The appellant was feeling "unwell" by reason of the combined effect of having "got real drunk the night before" and "a bad stomach ulcer which was playing up". During the course of the evening at the club, he "consumed one Bundy and Coke ... at about 9.15 p.m.", having already taken "a couple of Valium tablets at 7.30 p.m.". The appellant was aware that Taylor and A were also at the club. He did not approach them but "kept an eye on what (A) was doing" and "noticed that Jason Taylor was very drunk - real drunk". At about 10 p.m., and "for no reason" which the appellant

could see, Taylor walked up to him and punched him in the stomach. That made the appellant "feel more crook" and he "started trembling". According to the appellant, the "punch wasn't to start a fight". The appellant "kept right away and sat down". Later, during the evening, he had "a couple of dances" with three different females. Subsequently, he saw A "kiss Ian Sowell". Not long after, he saw an altercation between A and Taylor who "started pushing her around and telling her to 'piss off, piss off'". The appellant moved over to where they were. His unsworn statement continues:

> I wanted to go up to her and comfort her, but I didn't have the courage. I was a bit frightened about what would happen about the restraining order. Some other people came in and started comforting her. I motioned my arms to the people who was with her to see if she was alright. She seemed to calm down and remained in the company of other people.

Shortly afterwards, the appellant had a further encounter with Taylor in the club. He asked Taylor why he didn't leave A alone. Taylor replied: "yeah, yeah". Taylor "was crying drunk at this stage. He had tears in his eyes and was falling all over the place". Taylor then took A, who was crying, outside. A came back inside by herself and was still crying.

The cabaret at the club finished at about 1 a.m. on the Sunday. The appellant "was aware that there were several parties on afterwards". He went to one of them. He had seen Taylor leave the club with A and noticed that they were not at the party. He remained at that party for about fifteen minutes and then "went for a drive down the street". He "was concerned" that Taylor "might hurt" A. He had seen Taylor "throw a drink followed by a glass at (A) on a previous occasion and ... had seen her pushed about by him". He went to another local party where he remained for five minutes. He then went to a local cafe where he got something to eat and remained for about half an hour. He returned to the second party for a further five minutes. When he left there, he walked down the street with some other friends. He then got back into his car "and decided to go for a drive and then went to the clubrooms". His unsworn statement continues:

> I went into the recreation ground I saw Jason sitting in his car. He was sitting in the front seat and appeared to be dozing. I decided to go over and have a talk to him about getting into (A). I parked my car facing the same way as his about two metres away. I got out of the car and yelled 'Taylor, Taylor'. Just before I opened his door I saw (A). I could see her head across his lap. I noticed he had no trousers on. I then opened the door. I saw her giving him a head job. I saw she had her trousers off. He then said 'Piss off you cunt, piss off'. She was still in the same place. After he spoke she sort of looked up. I then spat it. I felt myself getting really wild. Seeing her like that with him and being told to 'Piss off you cunt' by Jason caused me to lose control. We had not been alone often. I just got wild. I had looked after her. When I used to go out with her we spent little time alone. He was one night standing her. I had looked after her. She had told me she had been raped when she was little. She used to cry in my arms over it. I was shocked. I felt that he was hurting me.
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> He had no trousers on and had an erection. She was naked from the waist down. I left the door open and turned around and went back to my car. I lit up a smoke. I had a butcher's knife in the car. I got it and took a couple of draws on my cigarette. I looked back at Jason and the car door was still open. Jason still had an erection and he was playing with himself. She was naked in the car. I had smoked about a quarter of the cigarette. I don't know what happened to the cigarette, but I think that I put it out. The week before at football training he called her 'a slut' because she got onto Tim Groves (George). I have remembered this since I made my statement to the police. I pushed his right shoulder with my left hand. His hands came up towards me to push me. I had the knife in my right hand, blade downwards. I grabbed the knife in both hands and lunged downwards at him. I did not care where the knife went. I think the knife hit one of his hands and then into his chest.

a It all happened so quickly. It was what I had seen that really worked me up. I was really worked up at the time.

When I went out with (A) I had never had sex with her. She had told me she was frightened of sex and that she had been raped when she was little. I don't know but I feel that perhaps she may have been forced into what she was doing. I knew that Jason was only using her, that he did not love her, whereas I did.

b It all happened really quickly. No-one said anything.

I was all worked up and feeling funny. It was like I was in a rage, almost to the stage where I felt dazed. It was like I really didn't know what happened until the knife went into him.

The defence of provocation, both at common law and under statutory provision, has attracted c a wealth of learned and instructive judicial and academic discussion. The judgments of members of the Tasmanian Supreme Court in the many cases involving an issue of provocation that have arisen since the enactment of the Code have made a significant contribution to that discussion. One finds in the authorities, including some Tasmanian judgments, a perception that, in this particular field of criminal law, the common law, the codes and other statutory provisions, and judicial decisions about them, have tended to interact and to reflect d a degree of unity of underlying notions. While we share that perception, we have thought it preferable, in disposing of the present appeal, to keep the focus of our consideration firmly fixed upon the provisions of s. 160 of the Code. In that regard, we are influenced by the fact that the provocation provisions of the Code differ significantly from the provocation provisions of the Criminal Codes of Queensland and Western Australia.

e Section 160 relevantly provides:

(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has f been time for his passion to cool.

(3) Whether the conditions required by subsection (2) were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law.

The section can be traced to s. 176 of the Draft Code prepared by the Criminal Code Bill Commission of 1879 for submission to the British Parliament. The draft s. 176, like the Draft g Code of which it formed part, was not introduced in England. It was, however, adopted by the Canadian Parliament and was in force in Canada when the Code was enacted by the Tasmanian Parliament in 1924 (see Criminal Code RSC 1906, c. 146, s. 261, formerly Criminal Code 1892, c. 29, s. 229). The only variation between s. 160(1) and (2) of the Code on the one hand and the corresponding sub-sections of the United Kingdom draft and the Canadian Code on the other was the insertion of the words and punctuation "and which, in fact, h deprives the offender of the power of self-control, is" in the Tasmanian subsection (2) in substitution for the words "may be".

The argument in the present case centred around four distinct questions. The first is the effect of the requirement of a defence of provocation under s. 160 that there be a "wrongful act or insult". The second is the content of the test embodied in s. 160(2)'s requirement that i the wrongful act or insult be "of such a nature as to be sufficient to deprive an ordinary person of the power of self-control". The third is the function of a trial Judge in deciding,

pursuant to s. 160(3), whether "any matter alleged is, or is not, capable of constituting provocation". The fourth, which is the ultimate issue on the appeal, falls to be answered in the light of the answers to those three earlier questions. It is whether the learned trial Judge was, in the circumstances of the case, correct in declining to leave provocation to the jury.

Any Wrongful Act or Insult

The composite phrase "wrongful act or insult" appears in a number of other statutory provisions dealing with provocation, including the Queensland and Western Australian Criminal Codes. The phrase did not, however, have any settled legal meaning when the Code was enacted in 1924 and it should not be seen as a technical one. Its critical words - "wrongful", "act" and "insult" - are words of wide general import which should be given their ordinary meaning. In the Report of the Criminal Code Bill Commission of 1879, the Commissioners - Lord Blackburn, Barry J (of the High Court of Justice in Ireland), Lush J and Sir James Stephen - commented (at pp. 24-25) that they had used the words "wrongful act or insult" in the draft s. 176 to introduce "an alteration of considerable importance into the common law" (see, also, Sir James Stephen, *A History of The Criminal Law of England*, (1883), Vol. 3, pp. 81-82, 85). In that context, the adoption of the phrase in s. 160(2) of the Code should be seen as involving a deliberate departure from the long prevalent common law approach that the kinds of conduct which could, as a matter of law, constitute provocation reducing murder to manslaughter were somewhat artificially confined and, putting to one side a confession of adultery, did not include a case of "mere words" (see, for example, Stephen, *A Digest of the Criminal Law*, 3rd Edn. (1883), pp. 161-164; *R v. Palmer* [1913] 2 KB 29, at pp. 30-31; *R v. Withers* [1925] 25 SR (NSW) 382, at pp. 389-391; *Reg. v. Camplin* [1978] AC 705, at pp. 714-715; *Moffa v. The Queen* [1977] 138 CLR 601, at pp. 605, 616-617, 619-621). Accordingly, the scope of the word "insult" in s. 160(2) should not be restricted by reference to earlier common law doctrine. In particular, it can denote an insulting word or gesture which is neither accompanied by nor in the context of physical violence or the conveyance of information.

There was some discussion in the course of argument about whether the adjective "wrongful" in s. 160(2) qualifies "insult" as well as "act". It would seem to have been consistently assumed in Tasmanian cases that "wrongful" does not qualify "insult" (see, for example, *Bedelph v. The Queen*, at pp. 40-41). Some support for the view that it does can be found in judgments dealing with the phrase "any wrongful act or insult" occurring in differently worded provisions of the Western Australian and Queensland Codes. In *R v. Scott* [1909] 11 WAR 52, Burnside J, referring to the effect of the composite phrase in the Western Australian Code, said (at p. 67) that he could not see:

> why an act in order to amount to provocation must be wrongful, but an insult may be of any character at all. The greater must be wrongful, the lesser need not be.

With due respect, however, his Honour's comments are scarcely persuasive. In the phrase "wrongful act", the adjective "wrongful" is necessary to import the element of offensiveness. The word "insult" involves the implication of offensiveness without a need for any accompanying adjective. Burnside J's opinion that "wrongful" qualified "insult" was not shared by the other members of the Full Court in *Scott.* Parker CJ dealt with the case on the basis that the relevant question was merely whether there had been "an insult". McMillan J expressed the strong view (at pp. 60-61) that the phrase "any wrongful act or insult" was not to be confined by reference to the common law and rejected (at pp. 61-62) the approach that the relevant provision required an insult which could be characterized as "wrongful".

In *Reg. v. Stevens* [1989] 2 Qd R 386, the Queensland Court of Criminal Appeal applied Burnside J's approach to the phrase "any wrongful act or insult" in the Queensland Code. In the course of his judgment, in which Kelly SPJ and Kneipp J concurred, Demack J said (at p. 392):

> The phrase is 'any wrongful act or insult' not 'any wrongful act or any insult', and the usual grammatical construction would require 'wrongful' to qualify both 'act' and 'insult'. Further, it is hardly to be expected that Parliament would wish to excuse a violent response to a trivial insult.

Again, however, those reasons are unpersuasive at least as regards the construction of the phrase in s. 160 of the Code. We do not see why "the usual grammatical construction would require" the word "wrongful" to qualify "insult" as well as "act". It is equally grammatical to read "wrongful act" and "insult" as the designated alternatives. It is true that the insertion of a second "any" in the phrase would have prevented ambiguity. So also, however, would the insertion of a second "wrongful". Nor, in our view, does the consideration that it is hardly to be expected that Parliament would wish to excuse a violent response to a trivial insult apply to govern the construction of the phrase "wrongful act or insult" in s. 160(2) of the Code. As the word "any" makes plain, the reference to "wrongful act or insult" was not intended to be confined by requirements of gravity or proportion. That confinement is to be found in the requirement of the following words of the sub-section to the effect that the wrongful act or insult must be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

The Court is not concerned in the present case with the construction of the phrase "any wrongful act or insult" as used in the context of the differently worded provisions of the Queensland and Western Australian Codes. That being so, it is inappropriate to express a concluded view about the relationship between "wrongful" and "insult" in the provocation provisions of those Codes. It suffices, for present purposes, to say that the word "wrongful" should not be read as qualifying the word "insult" in s. 160(2) of the Code. Neither syntax nor context requires that "wrongful" be so read. Moreover, the requirement that an "insult" be "wrongful" before it can constitute provocation would introduce unjustifiable difficulty in this area of the law. As McMillan J pointed out in *Scott* (at p. 62), "it would be difficult to speak of an insult, which is calculated when offered to an ordinary person to deprive him of the power of self-control, as being a rightful insult". If the word were construed as having the effect of introducing a critical distinction between the "wrongful" and the "rightful" insult, it would, presumably, be more likely to include the insult that was obviously false or inappropriate than that which was truthful or apposite. Yet the truthful or apposite insult is likely to be more provocative than that which is obviously false or inapposite.

Of such a nature as to be sufficient to deprive an ordinary person of the power of self-control

The requirement that the wrongful act or insult be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is clearly intended to involve an objective threshold test. It is only if that test is satisfied that it becomes necessary to consider whether the accused was, in fact, subjectively deprived of his or her self-control. As Wilson J pointed out in *Reg. v. Hill* [1986] 1 SCR 313, at p. 342; [1986] 25 CCC (3d) 322, at p. 344, the "rather cryptic statutory language requires interpretation in order to achieve the presumed purpose of the legislature in requiring the accused's conduct to be measured against that of the 'ordinary person'". Wilson J went on to identify "the rationale underlying the objective test" in words (at p. 343; p. 345 of CCC) which are, in our view, applicable to the corresponding test in s. 160 of the Code:

> The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.

As will be seen, however, that does not mean that the objective test was intended to be applied in a vacuum or without regard to such of the accused's personal characteristics, attributes or history as serve to identify the implications and to affect the gravity of the particular wrongful act or insult.

Section 160(2)'s objective test refers merely to depriving "an ordinary person of the power of self-control" without expressly identifying the extent of the necessary loss of control. In *Parker v. The Queen*, Taylor and Owen JJ were of the view that similar words in the objective test contained in s. 23(2) of the Crimes Act 1900 (NSW) should be construed as referring to such a loss of self-control by "an ordinary person" as would encompass what the accused had done. Their Honours said (at p. 641):

> surely, when the proviso requires that the provocation must be such that it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, it is speaking of loss of the power of self-control in relation to the act or acts causing death. In other words, the question is not whether there was some loss of the power of self-control, but whether the loss of self-control was of such extent and degree as to provide an explanation for or, to constitute, in some measure, an excuse for the acts causing death. And, of course, the provocation must have been of such a character as was calculated to deprive an ordinary person of the power of self-control to that extent.

This extract from their Honours' judgment was approved by four of the five members of the Court in *Johnson v. The Queen* [1976] 136 CLR 619, at pp. 637-638 (per Barwick CJ) and p. 658 (per Gibbs J, with whom Mason J (at p. 660) and Jacobs J (on the relevant question, at p. 666) agreed). It should be accepted as applying to s. 160(2) of the Code. Accordingly, the wrongful act or insult must have been capable of provoking an ordinary person not merely to some retaliation, but to retaliation "to the degree and method and continuance of violence which produces the death" (*Holmes v. Director of Public Prosecutions* [1946] AC 588, at p. 597; and see, generally, *Sreckovic v. The Queen* [1973] WAR 85, at p. 91).

The central question posed by the objective test - that is of such a **nature** as to be **sufficient** - obviously cannot be answered without the identification of the content and relevant implications of the wrongful act or insult and an objective assessment of its gravity in the circumstances of the particular case. Conduct which may in some circumstances be quite unprovocative may be intensely so in other circumstances. Particular acts or words which may, if viewed in isolation, be insignificant may be extremely provocative when viewed cumulatively. Thus, in *Moffa*, where the deceased's insulting conduct had culminated in the throwing of a telephone at the applicant, Gibbs J commented (at p. 616):

> However, it is no doubt right to infer that the throwing of the telephone was only the last straw that caused the applicant's control to collapse. In any case, in deciding whether there is sufficient evidence of provocation, it is necessary to have regard to the whole of the deceased person's conduct at the relevant time, for acts and words which considered separately could not amount to provocation may in combination, or cumulatively, be enough to cause a reasonable person to lose his self-control and resort to the kind of violence that caused the death. Everything that the deceased said and did on 21 August must therefore be considered in deciding whether there was provocation.

In the same case, Barwick CJ (at p. 606) referred to the "totality of the deceased's conduct" and pointed out that "a jury would be entitled to view the situation in its entirety".

Even more important, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult. Indeed, even mental instability or weakness of an accused could, in some circumstances, itself be a relevant consideration to be taken into account in the determination of the content and implications of particular conduct. For example, it may be of critical importance to an assessment of the gravity of the last of a series of repeated insults suggesting that the person to whom they are addressed is "mad" to know that that person has, and understands that he has, a history of mental illness. As Wilson J commented in *Hill* (at pp. 346-347; p. 347 of CCC), the "objective standard and its underlying principles of equality and individual responsibility are not ... undermined when such factors are taken into account only for the purpose of putting the provocative insult into context".

The "ordinary person" (sometimes called the "reasonable person" or "normal person") was a comparatively late arrival in the law of provocation. The hypothetical "person" designated by the phrase had, however, become firmly installed by the time of enactment of the Code. The phrase was not then, nor has it since become, "a term of legal art" in criminal law (see *Camplin*, at p. 714). The function of the ordinary person of s. 160 is the same as that of the ordinary person of the common law of provocation. It is to provide an objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter. While personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test of s. 160(2) relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical "ordinary person". Subject to a qualification in relation to age (see below), the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused. It will, however, be affected by contemporary conditions and attitudes (see per Gibbs J, *Moffa*, at pp. 616-617). Thus in *Parker* (at p. 654), Windeyer J pointed out that many reported rulings in provocation cases "show how different in weight and character are the things that matter in one age from those which matter in another".

It has been suggested that, under a provision such as s. 160(2), the jury should "be instructed to put themselves, as the embodiment of the ordinary person, in the accused's shoes" for the purpose of determining the possible effect of the wrongful act or insult upon the power of self-control of the ordinary person (see, for example, *Reg. v. Hill*, at p. 347; p. 348 of CCC). While such an instruction may not involve any misdirection or error when read in the context of a particular summing up, it seems to us that it should be avoided. True it is that the jury, viewed collectively, can be seen as representing the ordinary or average member of the public. To instruct the jury to put themselves in the shoes of the accused for the purpose of determining whether the wrongful act or insult was of such a nature as to deprive an ordinary person of the power of self-control could, however, involve the danger that it might be construed by an individual juror as an invitation to substitute himself or herself, with his

or her individual strengths and weaknesses, for the hypothetical ordinary person. The result could be to displace the objective standard by the particular juror's subjective view of his or her personal power of self-control regardless of whether it be greater or less than that which should be attributed to a hypothetical ordinary person. If that occurred, it would be but a short step to the position where a defence of provocation would be sustained by a particular juror only if that juror was prepared to concede that he or she would have been guilty of the crime of manslaughter if placed in the situation of the accused. That would involve a mistaken and unduly harsh operation of s. 160(2)'s objective test.

The function of the "ordinary person" in s. 160(2) should not be confused with the role of the "reasonable man" in the law of negligence (see, for example, *Moffa*, at p. 613; *Reg. v. Webb* [1977] 16 SASR 309, at p. 313). Before "provocation becomes an operative factor" in a murder trial, the prosecution "must have satisfied the jury beyond reasonable doubt that murder, provocation apart, had been committed by the accused" (per Barwick CJ, *Johnson*, at p. 633). To make what the reasonable man of the law of negligence would have done in the circumstances the controlling standard of what might constitute a defence of provocation to a charge of murder would in effect be to abolish the defence since it is all but impossible to envisage circumstances in which a wrongful act or insult would so provoke the circumspect and careful reasonable man of the law of negligence that, not acting in self-defence, he would kill his neighbour in circumstances which would, but for the provocation, be murder. The point was well made by the Full Court of the Supreme Court of Victoria (Herring CJ, Smith and Hudson JJ) in *Reg. v. Enright* [1961] VR 663, at p. 669, in a passage which was subsequently adopted by Neasey J, in the Tasmanian Court of Criminal Appeal in *Kearnan v. The Queen* (unreported, 2 August 1968):

> The doctrine of provocation is often stated in terms which make its application depend upon whether the provocation was such as could have destroyed the self-control of a 'reasonable' man. In this field, however, the 'reasonable' man is not that model of prudence that he tends to become in the law of torts. Here he is, by hypothesis, a person capable of losing his self-control to the extent of intentionally wounding or even killing another, when there is no need to do so for his own protection: *Attorney-General for Ceylon v. Perera*, [1953] AC 200. It is preferable, we think, to refer to him, as many of the cases do, as the 'ordinary' man. That expression points to the fact that he is brought into the doctrine for the purpose of denying the benefits of it, not to all those who react unreasonably to provocation, but only to those whose reactions show a lack of self-control falling outside the ordinary or common range of human temperaments.

The assumption underlying the objective test in s. 160(2) is not that to do an act which would otherwise be murder may be an ordinary or reasonable reaction to a wrongful act or insult. The assumption is that a wrongful act or insult may be of such a nature as to be sufficient to provoke an ordinary person to lose his or her self-control to an extent that he or she does the unreasonable and extraordinary, that is to say, an act which, were it not for the provocation, would constitute the crime of murder. In its context in s. 160(2), the phrase "to be sufficient to" should not be construed as meaning "would". It should be construed as meaning "to have the capacity to", "to be capable of" or "could" or "might" (see *Reg. v. Fricker* [1986] 42 SASR 436, at p. 443).

No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary.

The lowest level of self-control which falls within those limits or that range is required of all members of the community. There is, however, one qualification which should be made to that general approach. It is that considerations of fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test.

If s. 160(2) were applicable only to cases where the accused was an adult, there would be no compelling reason why the reference to the power of self-control of an ordinary person should be construed otherwise than as referring to the power of self-control of an ordinary adult. The sub-section is, however, applicable to cases where the accused is criminally responsible while still an infant (see the Code, s. 18). It has generally been accepted that it would be unduly harsh to require of an immature accused the minimum standard of self-control possessed by the ordinary adult. True it is that there are those who would see this qualification as a departure from an entirely objective standard of self-control. It is one thing to say that age may be taken into account in assessing the gravity of the provocation, but another thing altogether to say that it should determine the degree of self-control required in the circumstances. And once it is accepted that the required standard of self-control may be qualified by immaturity, then it may be argued that the qualification should be extended to other human conditions such as sex or senility. Moreover, it cannot be said that the criminal law displays a similar solicitude for youth in other areas. The test of criminal negligence giving rise to involuntary manslaughter is, for example, entirely objective, taking no account of the age of the accused (see *DPP v. Newbury* [1977] AC 500). But the approach may be justified on grounds other than compassion, since the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness. In *McHale v. Watson* [1966] 115 CLR 199, at pp. 213-214, Kitto J spoke of the exclusion of abnormalities in the formation of an objective standard of care for the purpose of negligence. His words are apposite in the present context:

> The principle is of course applicable to a child. The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard. In regard to the things which pertain to foresight and prudence - experience, understanding of causes and effects, balance of judgment, thoughtfulness - it is absurd, indeed it is a misuse of language, to speak of normality in relation to persons of all ages taken together. In those things normality is, for children, something different from what normality is for adults; the very concept of normality is a concept of rising levels until 'years of discretion' are attained. The law does not arbitrarily fix upon any particular age for this purpose, and tribunals of fact may well give effect to different views as to the age at which normal adult foresight and prudence are reasonably to be expected in relation to particular sets of circumstances.

There is, we think, adequate justification in policy, reason and authority for taking age, in the sense of immaturity, into account in setting the standard of self-control required by reference to the ordinary man (see *Camplin*, at pp. 717-718, 721-722; *Reg. v. Romano* [1984] 36 SASR 283, at pp. 288-289; *Hill* , at pp. 332, 337, 350-351, and 353; pp. 336, 340, 351 and 353 of CCC).

A more difficult question is whether the age of the accused should be attributed to the ordinary person in a case such as the present where the accused is a young adult in his or her late teens (see Age of Majority Act 1973 (Tas), s. 3). As a broad generalization, it is true

to say that the powers of self-control of a young adult of eighteen or nineteen years are likely to be less than those of a more mature person. On balance, it seems to us that the preferable approach is to attribute the age of the accused to the ordinary person of the objective test, at least in any case where it may be open to the jury to take the view that the accused is immature by reason of youthfulness. It should be mentioned that there are statements in some cases which support the view that the "ordinary person" under an objective test such as that contained in s. 160(2) should be invested with the sex as well as the age of the particular accused (see, for example, *Camplin*, at p. 718; *Reg. v. Conway* [1985] 17 CCC (3d) 481, at p. 487). As we have indicated, however, we consider that the only characteristic or attribute of the particular accused which should be attributed to the "ordinary person" for the purposes of the objective test of s. 160(2) is that of age (cf. *Reg. v. Romano*, at pp. 288-289; *Hill*, at pp. 351-352; p. 351 of CCC).

In the light of what has been written above, the effect of the threshold objective test of s. 160(2) can be stated in summary form. It is to pose for the jury the question whether, in all the circumstances of the case, the wrongful act or insult, with its implications and gravity identified and assessed in the manner we have indicated, was of such a nature that it could or might cause an ordinary person (or, when appropriate, an ordinary person of the age of the accused), that is to say, a hypothetical or imaginary person with powers of self-control within the limits of what is ordinary (for a person of that age), to do what the accused did. A consideration of that question will almost inevitably involve projecting the hypothetical ordinary person of s. 160(2) into the position of the accused at the time the killing. There is nothing objectionable about that so long as it is remembered that the reference to the ordinary person of s. 160 is not reference to a person of precisely identifiable powers of self-control but a reference to a person with powers of self-control within the range or limits of what is "ordinary" for a person of the relevant age. In that regard, it must be borne in mind that s. 160(2) refers to "**an ordinary** person" and not to "**the average** person".

A projection of the "ordinary person" of the objective test into the position of the accused at the time of the killing will, however, involve a particular difficulty in a case where the existence of some attribute or characteristic of the accused is relevant both to the identification of the content or the gravity of the wrongful act or insult and to the level of power of self-control of any person possessed of it. As Crawford J pointed out in *Jeffrey v. The Queen* [1982] Tas R 199, at p. 233, self-control tends to reflect many characteristics and "the degree of self-control possessed by a person may vary according to the specific qualities of his character". If, for example, a person is obsessively jealous or extraordinarily excitable and pugnacious, his powers of self-control are hardly likely to be within the range which might properly be regarded as "ordinary" (cf. *Reg. v. Fricker*, at p. 445). In a case where it is necessary to take some such characteristic or attribute into account for the purpose of identifying the content or gravity of the wrongful act or insult (for example, a case of a grave insult centred upon that characteristic or attribute), the objective test will, nonetheless, require that the provocative effect of the wrongful act or insult, with its content and gravity so identified, be assessed by reference to the powers of self-control of a hypothetical "ordinary person" who is unaffected by that extraordinary attribute or characteristic. In other words, the fact that the particular accused lacks the power of self-control of an ordinary person by reason of some attribute or characteristic which must be taken into account in identifying the content or gravity of the particular wrongful act or insult will not affect the reference point of the objective test, namely, the power of self-control of a hypothetical "ordinary person".

The Function of the Trial Judge under s. 160(3)

Unlike some other statutory provisions dealing with a defence of provocation, s. 160 contains no reference to onus of proof. In the absence of such reference, the fundamental principle enunciated in *Woolmington v. The Director of Public Prosecutions* [1935] AC 462 is applicable with the result that, in a case where the evidence gives rise to a question of provocation, the onus lies upon the Crown to disprove provocation beyond reasonable doubt (see *Packett v. The King* [1937] 58 CLR 190, at pp. 212, 222; *Moffa*, at pp. 607-608, 612, 628). That that is so has long been accepted in Tasmania and was not questioned in argument of the present appeal.

The words "and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law" were introduced into s. 160(3) in 1934. It has been suggested (see per Clark J, *Packett v. The King* [1937] 33 TLR 18, at p. 44) that the purpose of that amendment was "to restore the law as laid down in *Thorpe v. R*" [1925] 18 Cr. App R 189. In *Thorpe's* case (at p. 191), the Court of Criminal Appeal (Hewart LCJ, Avory and Shearman JJ) stated the law as being:

> If there is no evidence on which a verdict of manslaughter can properly be found, it is the duty of the Judge not to leave the question of manslaughter to the jury, but if there is evidence, then it is the duty of the Judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised.

(And see, generally, *Van Den Hoek v. The Queen* [1986] 161 CLR 158, at p. 161-162, 169). It is unnecessary to consider whether the amendment of s. 160(3) was, in truth, necessary to "restore" the position at common law. It suffices to say that the reference to "matter alleged" in subsection (3) should be construed as meaning matter or material in the evidence and that, at least in its amended form, subsection (3) entrusts to the trial Judge the "question of law" whether there is material in the evidence capable of constituting provocation. If, but only if, that question of law is answered in the affirmative, provocation must be left to the jury for its consideration even in a case where it has not been specifically relied upon by the defence.

In determining the answer to that question of law, a trial Judge must be mindful of the fact that, where provocation is raised by the evidence, the ultimate question for the consideration of the jury must be framed by reference to the onus of proof resting upon the prosecution. So framed, that ultimate question would be whether the jury are satisfied beyond reasonable doubt of the absence of provocation, that is to say, that the killing was unprovoked in the relevant sense. As Dixon J pointed out in *Packett*, at pp. 213-214:

> upon the question whether a finding of manslaughter on the ground of provocation would in a given case be unreasonable, the ruling of the House of Lords in *Woolmington's* case has, of course, an important bearing. For it may be open to entertain a reasonable doubt of provocation although it would be unreasonable to find affirmatively that provocation existed and was sufficient.

A trial Judge must also be mindful of the fact that the question is not whether he or she considers that there is a reasonable doubt that the killing was unprovoked. As s. 160(3) makes clear, that is a question for the jury. The question for a trial Judge is whether there is material in the evidence which is "capable of constituting provocation". The result is that the question for a trial Judge under s. 160(3) can be summarized as being whether, on the version of events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense.

In a frequently quoted passage in his judgment in *Packett* (at p. 217), Dixon J identified the reason why the question whether any matter alleged as capable of constituting provocation is made a matter of law as lying "in the main in the necessity of applying an overriding or controlling standard for the mitigation allowed by law" (and see, to the same effect, per Barwick CJ, *Johnson*, at p. 635). That does not, however, mean that there is a blurring of the functions of Judge and jury within the area in which a finding that the prosecution has failed to prove beyond reasonable doubt that the act causing death was unprovoked is reasonably open. Within that area, the trial Judge has the important functions of instructing the jury as to the law and, where necessary, assisting the jury as the facts. As s. 160(3) makes clear, however, the ultimate question whether the prosecution has proved the absence of provocation is a question of fact for the jury alone. That being so, a trial Judge should be conscious of the limited scope of the preliminary "question of law" whether there is material in the evidence "capable of constituting provocation" and of the need to exercise caution before declining to leave provocation to the jury in a case such as the present where it is sought to rely on a defence of provocation or failing to do so in a case where, even though provocation is not raised by the accused, there is material in the evidence which might arguably be thought to give rise to a defence of provocation (see *Packett*, at p. 218 (per Dixon J) and p. 220 (per Evatt J).

Should provocation have been left to the jury in the present case?

At the trial, and in the Court of Criminal Appeal, it was submitted on behalf of the appellant that the alleged sexual activities of the deceased and A (which A denied in her evidence) in the deceased's car constituted a "wrongful act" for the purposes of s. 160(2) for the reason that they involved an offence against s. 122(a) of the Code ("carnal knowledge ... against the order of nature"). That submission was rejected by the trial Judge and the Court of Criminal Appeal and was not relied upon in this Court. It was, however, argued in this Court, but not in the Courts below, that the conduct of Taylor immediately before he was killed constituted a breach of various provisions of the Police Offences Act 1935 (Tas) dealing with public order. Accepting the view of events most favourable to the accused, Taylor's statement (that is "piss off you cunt") could properly have been seen by the jury as an "insult" whose implications and gravity fell to be assessed in the context of the conduct in which he and A were allegedly engaged at the time he made it. In these circumstances, the gravity of the provocation in the present case will not be significantly affected by whether or not the insult or conduct constituted a technical breach of some statutory provision prohibiting acts such as cursing or swearing or using profane language in a "public place". That being so, and in view of the fact that the question of a breach of the Police Offences Act was not raised at the trial or in the Court of Criminal Appeal, the preferable course is to assume, without deciding, that the conduct involved some such breach of that Act and, on the basis of that assumption, to turn at once to the substance of the objective test.

If the question of provocation had been left to the jury and on the assumption that the jury may have reasonably found that the deceased's conduct involved both insult and wrongful act, the ultimate question for them in relation to the objective test would have been whether they were persuaded beyond reasonable doubt that the relevant words and conduct of the deceased were not of such a nature that they could or might cause an ordinary nineteen year old, that is to say, a hypothetical or imaginary nineteen year old with powers of self-control within the range or limits of what is ordinary for a person of that age, to do what the accused did. The provocative words and conduct consisted of the remark "piss off you cunt" viewed with, and in the context of, the sexual activities in which the deceased and A were allegedly engaging in a parked car late at night. The jury would have been entitled to identify

the implications and to assess the gravity of that provocative conduct in the context of relevant attributes and relationships, present and past, of the appellant. That being so, the jury might have viewed the remark made to the appellant as an insulting, profane and dismissive comment made to a person who had had a past relationship with A, who obviously (and to the knowledge of the deceased) remained infatuated with her, who had assumed,, and was maintaining, a protective attitude to her and who was convinced that she had been, and was then being, "used" by the deceased for his own sexual gratification. So to say seems to us to put the implications and the gravity of the provocative conduct at its highest from the accused's point of view.

The critical question is whether the jury might, if it accepted that view of the gravity and implications of the provocative conduct, have entertained a reasonable doubt about whether the objective test was not satisfied. In our view, no jury could have entertained such a reasonable doubt. The appellant's infatuation with - and associated jealousy in relation to - A was something which itself inevitably detracted from his actual powers of self-control. That being so, while the infatuation could be relevant to assessing the gravity of the insult involved in the profane and dismissive comment made to him, it cannot be seen, for the purposes of the objective test, as diminishing the power of self-control of the hypothetical ordinary person. There is an added element of artificiality involved in projecting the hypothetical ordinary person of the objective test into the situation of the appellant at the time of the killing since it is unlikely that a person with power of self-control within the range attributable to a hypothetical ordinary nineteen year old would, in all the circumstances including the Court order restraining the appellant from approaching A, have been at the scene in the first place. Certainly, in the context of that Court order and of the appellant's past harassment of A notwithstanding her discouragement of his advances, it is difficult to conceive that any ordinary nineteen year old would be even surprised to be told in strong and abusive terms to go away when he intruded, as the appellant did, upon the privacy of the deceased and A as they voluntarily engaged in sexual activity late at night in a darkened car. Be that as it may, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including the insulting remark, and the sexual activities in which he and A were allegedly engaging, was not of such a nature as to be sufficient to deprive any hypothetical ordinary nineteen year old of the power of self-control to the extent that he would go to his own car, obtain a butcher's knife and fatally stab the deceased with it. Put differently, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary nineteen year old.

It follows that the learned trial Judge was correct in declining to leave a defence of provocation under s. 160 to the jury. The appeal should be dismissed.

Also found at [1992] 2 CLJ 771